

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VINCENT DEPASQUALE,)	3:11-cv-00191-LRH (WGC)
)	
Plaintiff,)	<u>ORDER</u>
)	
vs.)	
)	
STATE OF NEVADA, et. al.)	
)	
)	
Defendants.)	

Before the court is Defendants' Motion for Reconsideration. (Doc. #36.)¹ Plaintiff opposed the motion. (Doc. #39.)

I. BACKGROUND

Plaintiff Vincent Depasquale (Plaintiff), a *pro se* litigant in custody of the Nevada Department of Corrections (NDOC), brings this action pursuant to 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 (ADA), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (RA). (Pl.'s Am. Compl. (Doc. #13) at , 5.) The events giving rise to this action took place while Plaintiff was housed at Ely State Prison (ESP), Northern Nevada Correctional Center (NNCC), and Lovelock Correctional Center (LCC). (*Id.*)

On October 17, 2011, Defendants filed a Motion to Dismiss, arguing that Plaintiff failed to exhaust his available administrative remedies. (Doc. # 18.) Plaintiff opposed (Doc. # 23) and Defendants replied (Doc. # 29). On April 27, 2012, the court issued its Report and Recommendation that Defendants' motion be granted in part, and denied in part. (Doc. # 34.) Defendants now seek reconsideration of that portion of the court's Report and

¹ Refers to court's docket number. Defendants also filed an errata to their motion. (Doc. # 38.)

1 Recommendation recommending partial dismissal of Count 1. (Doc. # 36.) Count 1 was
 2 asserted against defendants Robertson and Martin, yet Defendants' motion only addressed the
 3 claim with respect to defendant Martin. (Doc. # 18.) Therefore, the court granted the motion
 4 with respect to defendant Martin, but denied it as to defendant Robertson. (*See* Doc. # 34 at
 5 4.) Defendants now assert that they inadvertently failed to address defendant Robertson with
 6 respect to Count 1. (Doc. # 36 at 2.) They now argue that Plaintiff's grievance related to his
 7 eyesight does not mention defendant Robertson. (*Id.*)

8 **II. LEGAL STANDARD**

9 The Federal Rules of Civil Procedure do not contain a provision governing the review
 10 of interlocutory orders. "As long as a district court has jurisdiction over the case, then it
 11 possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory
 12 order for cause seen by it to be sufficient." *City of Los Angeles, Harbor Div. v. Santa Monica*
 13 *Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation marks and citation omitted)
 14 (emphasis omitted). This inherent power is grounded "in the common law and is not abridged
 15 by the Federal Rules of Civil Procedure." *Id.* at 887. While other districts in the Ninth Circuit
 16 have adopted local rules governing reconsideration of interlocutory orders, the District of
 17 Nevada has not. Rather, this district has used the standard for a motion to alter or amend
 18 judgment under Rule 59 (e). *See, e.g., Henry v. Rizzolo*, No. 2:08-cv-00635-PMP-GWF, 2010
 19 WL 3636278, at * 1 (D. Nev. Sept. 10, 2010) (quoting *Evans v. Inmate Calling Solutions*, No.
 20 3:08-cv-00353-RCJ-VPC, 2010 WL 1727841, at * 1-2 (D. Nev. 2010).

21 "A motion for reconsideration must set forth the following: (1) some valid reason why
 22 the court should revisit its prior order, and (2) facts or law of a 'strongly convincing nature' in
 23 support of reversing the prior decision." *Rizzolo*, 2010 WL 3636278, at * 1 (citing *Frasure v.*
 24 *U.S.*, 256 F.Supp.2d 1180, 1183 (D. Nev. 2003). Moreover, "[r]econsideration is appropriate
 25 if the district court (1) is presented with newly discovered evidence, (2) committed clear error
 26 or the initial decision was manifestly unjust, or (3) if there is an intervening change in
 27 controlling law." *Id.* (quoting *United States Aviation Underwriters v. Wesair, LLC*, No. 2:08-

1 cv-00891-PMP-LRL, 2010 WL 1462707, at * 2 (D. Nev. 2010) (internal citation omitted)).

2 **III. ANALYSIS**

3 Defendants argue that the court should reconsider its order denying their motion to
4 dismiss as to defendant Robertson in Count 1 because of mistake or inadvertence. The
5 court finds that Defendants have not set forth facts of a “strongly convincing nature” to
6 support reversal of the court’s prior decision.

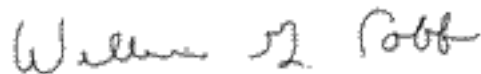
7 The failure to exhaust administrative remedies is treated as a matter in abatement
8 and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d
9 1108, 1119 (9th Cir.2003). Failure to exhaust administrative remedies is an affirmative
10 defense, and *defendants bear the burden of raising and proving failure to exhaust. Id.*
11 Defendants concede that they did not meet their burden with respect to defendant
12 Robertson. Nor did Plaintiff have an opportunity to present any rebuttal to the argument
13 they are now raising for the first time.

14 Accordingly, Defendants motion (Doc. # 36) is not well taken. Defendants may
15 properly raise the affirmative defense in a future dispositive motion, but because Plaintiff
16 was not given a chance to respond to their argument initially, the court will not reconsider
17 its order.

18 **IV. CONCLUSION**

19 Defendants’ Motion for Reconsideration (Doc. # 36) is **DENIED**.

20 DATED: May 25, 2012.

21 

22 WILLIAM G. COBB
23 UNITED STATES MAGISTRATE JUDGE
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